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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. CAIN, CHARLES F. BENDA and EMIL CONDE,

Petitioners,

VS.

MEDTRONIC, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

(1) Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

(2) Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (*Doe v. Bolton*, 410 U.S. 179, 197 [1973]).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, William C. Cain, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals (*infra*, 1a-8a) is noted at 688 F.2d 841 (7th Circuit 1982). The published opinion of the Court of Appeals (*infra*, 1a-31a) incorporates its unpublished opinion and the opinion of the District Court and is unreported at present. The opinion of the District Court (*infra*, 9a-26a) is not reported.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 13, 1982. A timely petition for rehearing was denied on September 2, 1982 (*infra*, 32a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

Medtronic, Inc. (hereinafter referred to as "Medtronic") is the world's largest manufacturer of ventricular and atrial pacemakers. The three petitioners, William C. Cain, Charles F. Benda, and Emil Conde, began working for Medtronic as pacemaker salesmen at various times during 1977. Their employment was on an at will basis. None had worked as a pacemaker salesman previously. All received training from Medtronic in the workings of pacemakers and in the manner of their implantation into the human body. Among their studies were physiology and electrophysiology. Within a few weeks each petitioner was covering the Chicagoland territory assigned to him, calling on various cardiologists and surgeons, and assisting in implant surgeries.

The implantation of cardiac pacemakers is performed in a hospital operating room. The pacemaker is a device consisting of a post generator which contains the power source to generate electrical charges, and an electrode or lead, which conducts these electrical pulses to the heart. Patients with chronic heart conductive disorders normally have the artificial pacemaker implanted in their bodies just under the skin. Operating personnel normally present are a surgeon, an anesthesiologist, a surgical assistant, a scrub nurse, a circulating nurse, an x-ray technician, and the pacemaker salesman. Often a cardiologist is also present.

The surgeon relies on the salesman to take special measurements when a pacemaker is implanted to determine whether it is going to function effectively in the patient. It is the job of the salesman to determine if the electrode wire of the pacemaker is properly connected

to viable heart tissue which is suitable for long-term pacing. This is done by means of fluoroscope images and various electrical instruments whereby the salesman can determine the stimulation and sensing thresholds of a given area of the heart. After the salesman determines that the electrode is properly connected to the heart, and the surgeon concurs, the surgeon implants the pacemaker.

Nor is the surgeon's reliance on the salesman always limited to the above functions. Some patients suffer from recurrent tachycardias, or rapid beating of the heart. These rapid heart rhythms are potentially life-threatening and can be triggered during a pacemaker implant, resulting in cardiac arrest. When a pacemaker is implanted in a patient with such a problem it is frequently necessary to position the electrode to a precise place inside the heart and to program the pacemaker to unusual functions. The salesman's assistance to the surgeon and the cardiologist under such circumstances is very important.

Though it seldom happens, the implantation of a pacemaker can result in the development of shock in a patient, or even death itself. Pacemaker patients are frequently elderly persons who require careful medical attention. Their average age is 68 years.

The petitioners are on call twenty-four hours a day, seven days a week, as it is often necessary to implant pacemakers on short notice. Since 1977 each petitioner has assisted at over one thousand surgeries. In addition to assisting at surgery, the salesmen are often called upon by cardiologists and surgeons to give advice concerning the pacing needs of particular patients, and the appropriate pacemakers for such patients. The salesmen are also frequently consulted by the doctors regarding

technological advances in the pacemaker field which are occurring constantly. The level of expertise of a salesman is an important factor in a physician's decision to call on him for technical advice and for assistance in surgery. Not all salesmen possess the same level of expertise.

A salesman is not compensated for assistance in surgery as such. Rather his income is related to the number of pacemakers sold to the hospital accounts to which he is assigned. If a physician wants to use the services of a salesman in surgery, he will ordinarily implant the pacemaker of the salesman's company.

Each petitioner was an excellent salesman for Medtronic, doubling Medtronic's share of the market in his respective territory. In late August or early September, 1981, each petitioner resigned from Medtronic and became an independent sales representative with a competitor, Intermedics, Inc.

Immediately upon his resignation Medtronic sued each petitioner for injunctive relief based on identical restrictive covenants which the petitioners had signed in 1977. The covenant states as follows:

> "For 360 days after termination of my employment with the Company, I will not attempt to divert any Company business by soliciting, contacting, or communicating with any customers for the Company's products with whom I, or employees under my supervision, had contact during the year preceding termination of my employment."

In late September, 1981, Medtronic dismissed its complaints for injunctive relief and filed amended ones asking for declaratory relief. On October 29, 1981, shortly before trial, Medtronic amended its complaint for declaratory judgment so as to request injunctive relief as

well. At that time Medtronic asked that each petitioner be enjoined from soliciting, contacting or communicating with any customers of Medtronic located in his former Medtronic sales territory, and specifically those hospitals in his former territory and all physicians and surgeons associated with those hospitals with whom the petitioner had contact during the year preceding termination of petitioner's employment. Cain's answer to Medtronic's complaint stated that the restrictive covenant was invalid.

During October and early November of 1981 Cain assisted in ten surgeries in his former territory, each at the specific request of the attending surgeon. And Benda assisted in eighteen surgeries at surgeons' requests in his former territory. Medtronic contended that a petitioner's assistance at such a surgery was a violation of the restrictive covenant. The petitioners argued that the covenant did not extend to surgeries attended at the specific request of a surgeon.

On November 10, 1981, the second day of the trial, the District Judge entered an order restraining each petitioner in the territory in which he was formerly employed from attempting to divert any Medtronic business by soliciting, contacting or communicating with any customer for Medtronic's products with whom the petitioner had contact during the year preceding termination of his employment. For purposes of the restraining order the word customer included physicians.

Later in the trial the petitioners put on two medical witnesses, Dr. Richard Kehoe, a cardiologist at Northwestern Memorial Hospital, Chicago, Illinois, and Dr. Andrew Carney, a surgeon at Oak Park Hospital, Oak Park, Illinois. Both testified about the nature of implant surgery and special problems associated with it. Dr.

Kehoe, who had worked with Cain since 1979, stated that Cain was the person to whom he primarily looked for expertise concerning heart pacing problems. Dr. Carney, who had worked with Benda since 1977, testified as to Benda's high level of competence in assisting him in implant surgery. He said that he wanted Benda to assist him whenever he implanted a pacemaker. Dr. Kehoe likewise stated that he wanted continued access to Cain, an access that he believed had been significantly impaired by virtue of Medtronic's suit.[1]

At the conclusion of the trial the District Judge continued the temporary restraining order in effect pending decision. However, he allowed each petitioner to assist in emergency surgeries in his former territory. He further directed that each emergency be reported to Medtronic's counsel within twenty-four hours.

On December 17, 1981 Cain moved the District Court to modify its preliminary injunction to (1) allow him to attend an upcoming surgery of Dr. Kehoe's, and (2) allow him to assist in any surgery where a cardiologist or surgeon insisted on his attendance. The District Court denied this motion and Cain appealed. On January 21, 1982 the Seventh Circuit Court of Appeals modified the preliminary injunction so as to permit Cain to assist in any surgery where a cardiologist or surgeon specifically requested his attendance. The modification was effective for two weeks, subject to a request for renewal. On January 22, 1982 District Judge George N. Leighton extended the terms of the modification to Benda and Conde. During that two-week period the petitioners assisted in more than fifteen surgeries under the terms of the modification order.

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[1] The testimony of Dr. Kehoe and Dr. Carney appears at pp. 537-551 and 650-665 of the trial court transcript.

On February 4, 1982 District Judge Bernard M. Decker entered a permanent injunction against the petitioners whereby each was ordered as follows:

> "not to attempt to divert any Medtronic business by soliciting, contacting or communicating with any customers for Medtronic products, including physicians, with whom he, or employees under his control, had contact during the year preceding his resignation from Medtronic." (App. 26a)

In his accompanying memorandum opinion the District Judge specified that attendance at surgeries in a petitioner's former territory was prohibited (App. 26a, 22a). No exceptions were made for situations where a physician specifically requested a salesman's assistance in surgery. Nor did the opinion discuss the petitioners' contention that to prohibit such assistance in surgery violated public policy. The District Court simply stated that to protect the public interest medical emergencies were excluded from otherwise prohibited contacts (App. 23a). The injunctions on the petitioners expired on different dates in late August, 1982 (App. 25a, 26a). The petitioners appealed.

Pending appeal the petitioners moved the District Court to modify its permanent injunction to allow each petitioner to assist in any surgery where a cardiologist or surgeon specifically requested his attendance. The District Court denied this motion. The petitioners renewed this motion before the Seventh Circuit Court of Appeals. Various cardiologists and surgeons in the Chicago area filed an amicus memorandum in support of the petitioners' requested modification. On March 4, 1982 the Court of Appeals denied the modification.

The appeal was briefed and argued.[2] On July 13, 1982 the Court of Appeals affirmed the District Court's decision. The Court held that the public interest was not significantly harmed by enforcing the covenant, as other salesmen could serve the needs previously served by the petitioners (App. 6a-8a). Cain petitioned for a rehearing, with a suggestion for a rehearing *en banc*. That petition was denied on September 2, 1982 (App. 32a). Cain then requested that the Court of Appeals stay its mandate pending the filing of a petition for writ of certiorari in this Court. The Court of Appeals denied this request and its mandate issued on September 9, 1982.

On October 13, 1982 Medtronic filed a motion before District Judge Bernard M. Decker asking leave to file an amended and supplemental complaint seeking damages in excess of two million dollars against each of the petitioners. This new complaint is based on the same facts involved in the instant case. The petitioners have opposed this motion and the matter is presently being briefed.

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[2] On March 24, 1982 the Court of Appeals denied the request of the amici heart surgeons to file a brief in support of the petitioners.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Seventh Circuit has decided an important question of Federal law which, has not been, but should be, settled by this Court, namely: Is it contrary to public policy to enforce a restrictive covenant so as to prohibit a pacemaker salesman from assisting in implant surgery, even though his assistance has been specifically requested by a cardiologist or surgeon?

A related question is also presented, namely: Does such a prohibition violate a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it, as guaranteed by the Fifth and Ninth Amendments to the United States Constitution? (See *Doe v. Bolton*, 410 U.S. 179, 197 (1973).)

The public policy question presented here results from the union of high technology and medicine. At stake is the question of whether the physician has the right to select the pacemaker technician he thinks best qualified to assist him in implant surgery, or whether a pacemaker company can veto that choice on the basis of an asserted proprietary interest in the physician. The lower courts have upheld Medtronic's claimed veto power. The petitioners believe that it is contrary to public policy for a pacemaker company or a court to interfere with a physician's judgment in such an important area, and one traditionally within the physician's expertise.

Each year approximately 150,000 pacemakers are implanted in the United States. The patients rely on the success of the surgery in order to keep their hearts

functioning properly. The pacemakers are complex devices, with a new "generation" of pacemakers being developed every twelve to eighteen months. The petitioners herein are highly trained and very knowledgeable concerning the operation of pacemakers and the manner of implanting them into the human body. Both sides agree on that. Nor is there any disagreement over the fact that many physicians relied on the expertise of the petitioners not only in surgery but before and after as well. As David Raich, Medtronic's Chicago area sales manager, responded when asked what input the salesman would have that the physician would be looking for:

> A. "In my opinion, by virtue of his (the salesman's) expertise and the total number of implants that he has attended, he probably has more experience than the physician, per se."
>
> "Since, pacing generally represents about two percent of his (the physician's) practice and it represents one hundred percent of our work, he (the salesman) will have that expertise. So, he may have some skills that the physician may not (have) relative to that particular equipment. Relative to that particular question." (Tr. 169, 170).

Thus, the facts in this case clearly show that cardiologists and surgeons rely a good deal on pacemaker salesmen. And it is out of that reliance that important issues of public policy grow.

Before getting into a further discussion of the public policy issue it is best to discuss why this case is not moot, even though the one-year injunction periods have expired. The reasons are twofold. First, the Court of Appeals decision still has important effects on the petitioners. Second, because of the widespread use of restrictive covenants in the pacemaker industry, a deci-

sion herein will have great impact on public health throughout the country.

As to the first reason, Medtronic is presently seeking leave of the District Court to file its amended and supplemental complaint asking in excess of two million dollars in damages against each of the petitioners. This new complaint is based on the same facts litigated in the original trial herein, and its legal theory rests on the Court of Appeals decision herein. A reversal of that decision on the public policy issue would favorably affect the petitioners' situation on matters pending in the District Court.

Furthermore, as to Cain, Medtronic has prosecuted fourteen charges of civil contempt against him relating to claimed violations of the preliminary injunction. Those charges were tried on April 19, 1982 and a decision is being awaited. Most of the fourteen charges concern surgeries which Cain assisted in at the specific request of a cardiologist or surgeon.[3] A decision here on the public policy issue would obviously affect the outcome of the contempt case.

Additionally, Medtronic has filed an ancillary action against Intermedics, Inc. in the District Court for the Southern District of Texas, Houston Division, No. Misc. 82-147, seeking access to Intermedics' records to determine if Cain assisted in any surgeries in his old territory after the entry of the permanent injunction. That matter has also been briefed, and the parties are awaiting the decision of District Judge Norman W. Black. A decision on the public policy issue could also affect that case.

[3] Seven of these charges concern "specific request" surgeries which Cain attended during the two week modification of the preliminary injunction.

But even if none of the above proceedings had occurred, this Court should issue its writ of certiorari in oder to review the public health implications of the decision herein. In *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179, this Court ruled on important constitutional questions concerning the right to abortion and the physician-patient relationship. Both of those cases were held not to be moot even though the pregnancies of both appellants had ended well before this Court ruled. In *Roe v. Wade* at 125, this Court held that "(p)regnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review.' (citations omitted)." See also *Doe v. Bolton* at 187.

Likewise, a one year injunction period in a restrictive covenant is not long enough "to survive much beyond the trial stage and appellate review (would) be effectively denied." *Roe v. Wade* at 125. Thus, the situation here could also be "capable of repetition, yet evading review." However, because of the nationwide importance of the issues involved and the fact that similar covenants are involved in litigation throughout the country, the public policy issue should not be held moot.

The use of restrictive covenants is widespread throughout the pacemaker industry. The petitioners even had to sign restrictive covenants similar to Medtronic's when they became associated with Intermedics (App. 8a). And Medtronic's argument to the Court of Appeals when it requested publication of the decision herein attests to the national significance of the ruling. Medtronic's motion stated:

> "1. This case is only one of a number of cases around the country in which Medtronic, Inc., has been compelled to resort to the courts for enforcement of its restrictive covenant clause in its em-

ployee agreement. See, for example, *Medtronic, Inc. vs. Gibbons*, 527 F. Supp. 1085 (D. Minn. 1981), quoted by this Court in its opinion."

"2. Publication of an appellate decision affirming the lower Court's issuance of an injunction is of continuing public interest, and could very well contribute to the reduction of future litigation on this same issue."

Since Medtronic has about 40% and Intermedics about 17% of the market in pacemakers, the restrictive covenants of these two companies alone have great national impact.

In order to see the deleterious effects of restrictive covenants in health care one need only look at the facts of this case. After Benda resigned from Medtronic Dr. Carney had need of an A-V Sequential pacemaker for an implant. He called Medtronic and was told by Mr. Raich that Benda had left Medtronic, but Raich promised Dr. Carney that he would personally assist him in the implant. Instead Raich sent a salesman whom Dr. Carney had never met. Dr. Carney was so unsatisfied with that salesman's performance that he told him to leave. An engineer from Medtronic was sent to replace the dismissed salesman and, finally, the pacemaker was implanted. Dr. Carney was so displeased with that experience that he personally contacted Benda and asked him to be available for future implants. Dr. Carney then used Benda's assistance in his subsequent surgeries. (Tr. 657, 658)

After Benda's resignation from Medtronic there was one other instance when Dr. Carney used the assistance in surgery of someone other than Benda. In both of these instances he was unsatisfied with the assistance he received. He believed that the quality of patient care was adversely affected in each instance. The trial judge appeared to concur in this assessment. (Tr. 663, 664)

Dr. Kehoe complained to the trial judge that Medtronic's suit had significantly impaired his accessibility to Cain. This had placed a certain amount of strain on Dr. Kehoe, as Cain was the person he primarily looked to for expertise in the pacing area. If access to Cain was denied him (as it was), he would have to resort to dealing with people in whom he had a lower level of confidence. (Tr. 546, 547)

The problems caused to Dr. Carney and Dr. Kehoe in their medical practices by the enforcement of Medtronic's covenant are indicative of why such a covenant violates the public interest. Simply put, it interferes with a physician's care of his patients in a critical area. Any covenant which does that is not in the public interest. Clearly, such a covenant violates a patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it. See *Doe v. Bolton*, 410 U.S. 179, 197 (1973). The public interest is served by allowing a cardiologist or surgeon unimpeded access to the salesman on whom he has relied for advice and for assistance in surgery for a number of years. The salesman has become a valuable member of the surgical team, a critical part of the physician's care for his patients (Tr. 660).

It is evident from the facts of this case that many of the physicians with whom the petitioners dealt while at Medtronic wanted continued access to the petitioners' services. They were not so much interested in implanting Medtronic pacemakers as they were in having continued use of the petitioners' expertise. If Intermedics' pacemakers now accompanied the petitioners' services, that was fine with these physicians. After all, each company makes good pacemakers. However, by virtue of their resignations, Medtronic had lost the right to the petitioners' services. Yet, ironically, Medtronic used the re-

strictive covenant, to which the physicians were not a party, to prevent those same physicians from using the petitioners' services, to which Medtronic no longer had the right. Surely, such an interference in the physicians' practice of medicine cannot be in the public interest.

The decision in this case is contrary to the principles enunciated in a long line of previous cases. It has not historically been one of the roles of the judiciary to dictate to surgeons whom they can or cannot use for technical assistance in surgery. Courts have hitherto deferred to a physician's judgment in matters concerning the treatment of that physician's patient. As the court stated in *United States v. Vuitch*, 305 F. Supp. 1032, 1034 (D.C. 1969): ". . . the law generally has been careful not to interfere with medical judgment (sic) of competent physicians in treatment of individual patients . . ."[4] See also *Nyberg v. City of Virginia*, 495 F.2d 1342, 1344 (8th Cir. 1974); and *Rosen v. Louisiana State Board of Medical Examiners*, 380 F. Supp. 875, 877 (E.D. La. 1974).

The Seventh Circuit Court of Appeals itself has recognized that governmental bodies should not interfere in the practice of medicine. In *American Medical Assn. v. Weinberger*, 522 F.2d 921, 925 (7th Cir. 1975), the Court upheld the issuance of a preliminary injunction against the enforcement of some H.E.W. regulations, in large part because the regulations may have operated so as to interfere with a physician's medical decisions.

That Court went on to note that if trial of the case showed the regulations to have such an effect that they would (1) be in violation of 42 U.S.C. §1395 (which pro-

[4] This quotation was cited in *United States v. Vuitch*, 402 U.S. 62, 68 (ftn. 3) (1971). However, that case did not turn on this issue.

hibits government action which interferes with the practice of medicine) and (2) perhaps amount to unconstitutional conduct. In reference to the second point that court noted that "[i]n *Doe v. Bolton*, 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973), the Supreme Court concluded that requiring approval of a licensed physician's medical decisions violates the constitutional rights of both physicians and patients." *American Medical Assn. v. Weinberger, supra*, at 925. Yet that same Court has here upheld an injunction that prohibits physicians from having the technician, who they deem best qualified, assist them in surgery. Clearly the situation here is at least as much an interference in the practice of medicine as the one in *American Medical Assn. v. Weinberger* was.

The leading case on the constitutional rights involved in the physician-patient relationship is *Doe v. Bolton*, 410 U.S. 179. There this Court held that "[a] woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it [were] substantially limited by . . ." a Georgia statute requiring advance hospital committee approval of the abortion decision, *Id.* at 197.

In that case this Court gave full constitutional protection to the free exercise of a surgeon's "medical judgment", *Id.* at 192. Under Georgia law regulating abortions, a surgeon was limited to considering only three reasons which were set forth in the state abortion statute for recommending an abortion. The district court struck down this limitation allowing physicians to consider "*all* the attendant circumstances", *Id.* at 191. This Court agreed, stating, "the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may

relate to health. This allows the attending physician the room he needs to make his best medical judgment." *Id.* at 192. It is just this sort of room which the surgeon needs in choosing his assistants for surgery which is restricted by the injunction herein.

Medical judgments are essentially unreviewable. "It is still true today that '(r)eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he (the physician) possesses the requisite qualifications.'" *Id.* at 200 citing *Dent v. West Virginia*, 129 U.S. 114, 122-123 (1889); see also *United States v. Vuitch*, 402 U.S. at 71. Clearly, if the medical judgment concerning the propriety of an abortion rests with the physician as a matter of constitutional law, then the choice of procedures and personnel (matters which fall even more directly within a surgeon's professional training) are at least equally protected.

Medtronic has previously attempted to distinguish *Doe v. Bolton*, and *American Medical Assn. v. Weinberger, supra*, on the ground that those cases dealt with direct restraints on physicians' medical judgments, whereas the instant case does not (Medtronic's Appellate Brief, p. 27). However, it is clear that the choice of a pacemaker technician to assist in implant surgery is an important one for a surgeon to make.[5] As such it is by definition a medical judgment and, thus, must be left to the surgeon to decide without interference by a pacemaker company or a court.

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[5] Dr. Carney agreed that that choice was a critical part of patient care (Tr. 660).

As this Court said in *United States v. Vuitch*, 402 U.S. 62, 72 (1971):

> "Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered."

It does not make sense for the courts to entrust the surgeon with the responsibility for surgery, and yet, at the same time veto the surgeon's selection of technical assistance. If the surgeon is going to be relying in some way on the knowledge of a technician, his selection of that technician should be unfettered. Though the injunction herein does not violate the constitutional rights of the petitioners, it clearly violates the constitutional rights of the physicians and patients whom the petitioners serve. For, to paraphrase *Doe v. Bolton*, the patient's right to receive medical care in accordance with his physician's best judgment and the physician's right to administer it are substantially limited by the District Court's injunction, *Id.* at 197. And such a limitation on the practice of medicine must necessarily be contrary to public policy.

The applicability of the constitutional principles enunciated in *Doe v. Bolton* was not discussed by the Court of Appeals here. That Court simply held that the covenant did not violate public policy. It based this holding on three related findings:

> (1) "There is nothing to indicate that the quality of medical care would suffer by enforcement of the restrictive covenant." (App. 6a)
>
> (2) "And while (the petitioners) personal services may be desired and helpful, there is no evidence indicating that services of equal quality and quantity are unavailable." (App. 7a)[6]

[6] There is nothing involved in this case concerning the quantity of salesmen's services. The Court of Appeals' reference to this is puzzling.

> (3) "There is nothing to indicate that needs previously served by the appellants cannot be served by others or that there is a shortage of salespersons possessing the skills and abilities of the appellants." (App. 8a)

There are two problems with these findings. First, they are factual findings which are properly made by the trial court, and not by the Court of Appeals. Second, the evidence adduced at trial contradicts these findings.

Insofar as findings of fact were required to determine (1) whether salesmen possessing skills equal to those of the petitioners were available to physicians in the three territories, and (2) whether the quality of medical care would suffer by enforcement of the restrictive covenant, these findings should have been made by the District Court. However, since the District Court did not even discuss the public policy question (much less make findings concerning it), the Court of Appeals took it upon itself to do so. This was error. As this Court stated in *DeMarco v. United States*, 415 U.S. 449, 450 (1974):

> "Fact finding is the basic responsibility of district courts, rather than appellate courts, and . . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court."

See also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ... U.S. ....., 102 S.Ct. 2182, 2190 (1982) and *Pullman-Standard v. Swint*, ... U.S. ....., 102 S.Ct. 1781, 1791 (1982) where this Court cited *Moore's Federal Practice*:

> "See 5A J. Moore, & J. Lucas, Moore's Federal Practice § 52.06[2] (1981) ("Where the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgment and remand the

action for appropriate findings to be made");" (Citations omitted)

However, it is the petitioners' position that the interference worked on the practice of medicine by the restrictive covenant here is, as a matter of law, a violation of public policy. Besides, it is clear from the trial testimony that the quality of medical care was adversely affected by enforcement of the covenant. Dr. Carney testified to that effect (Tr. 657-58, 664-65). Likewise, that was the thrust of Dr. Kehoe's testimony (Tr. 544-547).[7] Medtronic put on no testimony contradicting that of either doctor. Furthermore, it is evident that if a physician is deprived of the technician on whom he relied for advice and for assistance in surgery, the quality of medical care that the physician can provide will suffer. Just witness the two surgeries that Dr. Carney had to perform without Benda's assistance. One cannot simply remove a valued member of the surgical team for a year or so, and not have any effect on patient care.

The Court of Appeals' answer to this problem, as noted above, was to find that other equally skilled salesmen were available to the physicians. Not only is there no basis in the record for this finding, but the testimony of the physicians contradicts it. Dr. Kehoe found that some pacemaker salesmen were incapable of even under-

[7] The Court of Appeals also relied on *Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1083 (D. Minn. 1981) as support for its decision (App. 6a). However in that case the Plaintiff's motion for a preliminary injunction was decided upon "the verified complaint, the affidavits submitted by the parties, the depositions in the file, and the memoranda and arguments of counsel", *Gibbons* at 1087. There was neither medical testimony nor a trial as was the case here. Nor did *Gibbons* discuss the constitutional issues raised here. Thus, *Gibbons* can hardly be relied on to support the decision herein.

standing the heart pacing problems of his patients (Tr. 544). He stated that in his view Cain was the person with the most expertise in these areas (Tr. 547).

Dr. Carney also testified that the skills of salesmen vary, and that an unskilled salesman would pose dangers to the implant patient (Tr. 659). In Dr. Carney's view some salesmen are trained only in the electronics of implantation and have no skills beyond that (Tr. 656). Dr. Carney trained Brenda in the physiology associated with cardiac output and brain blood flow (Tr. 660-61). He wants Benda to assist him whenever he implants a pacemaker (Tr. 658). He obviously thinks Benda is the most skilled salesman he knows.

Simply as a matter of common experience we know that persons in a particular trade or profession vary in skill, often greatly. The doctors' testimony only confirms the application of this general knowledge to the pacemaker field.

Yet, the Court of Appeals' presumption that equally skilled salesmen are available returns us to the central question of this case, namely, should a court have any role in dictating to a physician whom he may rely on for technical advice or for technical assistance in surgery? Or, do these matters lie solely within the province of the physician? The petitioners strongly contend that only the latter alternative is consistent with the public interest.

Both Dr. Kehoe and Dr. Carney stated that they believed it was their prerogative to select a salesman on whom to rely for assistance (Tr. 545, 660). And they are correct. It is the physician's choice by right, not that of a pacemaker company or a court.

The physician has the responsibility for the success of surgery. And he has the burden of selecting the best personnel available to assist him. His patients are entitled to no less. Since his is the burden, his also is the choice. For, where the responsibility lies, there also lies the right of choice. Indeed, this is a constitutional right.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law.

CONCLUSION

For the reasons severally and collectively assigned here, it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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